88-2139

Supreme Court, U.S.
FILED
JUN 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MANVILLE SALES CORPORATION, PETITIONER

V.

A. T. & T. TECHNOLOGIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Whether the Trial Court's Summary striking of the Petitioner's mechanics lien, without a hearing, for failure to file an Affidavit of Service, constituted a deprivation of property without due process of law in violation of the due process clause of the 14th Amendment.

LIST OF OTHER PARTIES

All of the parties in the Supreme Court of Pennsylvania are listed in the caption.

CORPORATE PARTY'S AFFILIATIONS

Petitioner is a wholly-owned subsidiary of Manville Corporation. Petitioner has no subsidiaries. The following corporations are affiliates of Petitioner by virtue of being subsidiaries of Petitioner's parent corporation, Manville Corporation:

European Overseas Corporation (Del.)

Glaswerk Schuller G.m.b.H. (Germany)

Holophane Europe Ltd. (United Kingdom)

Holophane International Corporation (Del.)

International Manville Corporation (Del.)

Johns-Manville Corporation (New York)

Johns-Manville India Limited (Del.)

Ken-Caryl Ranch Corporation (Del.)

Manville Canada Inc. (Ontario)

Holophane S.A. de C.V. (Mexico)

Rocky Mountain International Insurance Ltd. (Bermuda)

Sunbelt Contractors, Inc. (Texas)

Manville de France S.A. (France)

Manville Deutschland G.m.b.H. (Germany)

Manville Espanola S.A. (Spain)

Manville Europe Corporation (Del.)

Manville Forest Products Corporation (Del.)

Arkansas & Louisiana Missouri Railway Co. (Louisiana)

Pine Pipeline, Inc. (Louisiana)

Manville (Great Britain) Ltd. (United Kingdom)

Manville h.f. (Iceland)

Manville Investment Corporation (Colorado)

Manville Italiana S.p.A. (Italy)

Manville Japan Ltd. (Japan)

Manville Mexicana S.A. de C.V. (Mexico)

Manville Produtos Florestais Ltd. (Brazil)

Lages Reflorestamento Ltda. (Brazil)

Igaras-Servicos Agro-Florestais Ltd. (Brazil)

New Materials Inc. (New York)

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TO THE SUPREME COURT OF PENNSYLVANIA

A writ of certiorari is respectfully sought to review the Order of the Supreme Court of Pennsylvania denying allowance of appeal from the Superior Court which upheld the lower Court's summary striking of the Petitioner's mechanics lien without a hearing.

OPINIONS BELOW

There was no opinion of the Supreme Court. A copy of the Court's Order denying Petitioner's Petition for Allowance of Appeal from the decision of the Superior Court is set forth in Appendix B to this Petition.

The opinion of the three-judge panel of the Superior Court, not reported, is set forth in Appendix B. Likewise, the Order of the Superior Court denying the Petitioner's Application for Reargument is set forth in Appendix B.

The opinion of the lower Court, the Court of Common Pleas of Berks County, Pennsylvania, not reported, which was issued after the Petitioner appealed to the Superior Court from the lower Court's

Summary Order, is set forth in Appendix B. Finally, the lower Court's two sentence Order summarily striking the Petitioner's mechanics lien is also set forth in Appendix B.

JURISDICTION

1. The Order of the Supreme Court of Pennsylvania was entered on March 31, 1989 (infra, Appendix B, p. 26). It is final by its terms.

2. The federal question was raised as indicated in the excerpts from the record in the body of this Petition, infra, pp. 9-10, Appendix C, pp. 42-45.

3. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment to the Constitution of the United States provides in pertinent part as follows:

> "...nor shall any State deprive any person of life, liberty or property, without due process of law..."

The text of the relevant provisions of the Pennsylvania Mechanics Lien Law of 1963 is set forth in full in Appendix A, infra, pp. 20-25.

STATEMENT OF THE CASE

This case originated upon the filing of a Complaint by the Petitioner to enforce a mechanics lien it had entered against the Respondent almost two years before. The Respondent filed Preliminary Objections including a Motion to Strike the Mechanics Lien because the Petitioner

had failed to file an Affidavit of Service of Notice of the filing of the mechanics lien within twenty days after service as required by statute.

No hearing was held, but Petitioner, in its brief in opposition to the Respondent's Preliminary Objections argued that the lien could not be invalidated on a technicality, because the Respondent (1) had admittedly received notice of Petitioner's intent to file the mechanics lien prior to its filing, (2) was guilty of laches, and (3) had either waived or was estopped from raising the failure to file the Affidavit of Service. Since there were no facts in the record to support a waiver or estoppel, the Petitioner, in its brief, requested a hearing to establish those facts.

After reviewing the briefs of both parties, the Berks County Court of Common Pleas entered the following Order, without opinion:

> "AND NOW, the 27 day of April, 1987, Defendant's Preliminary Objections are sustained. The mechanics lien claim filed in this action on April 1, 1985 is hereby stricken." (Appendix B, infra, p. 41)

Upon Petitioner's appeal to the Superior Court from the lower Court's Summary Order, the lower Court issued an opinion pursuant to the Pennsylvania Rules of Appellate Procedure. In that opinion, the Court held that the Petitioner was not entitled to the defense of laches, or the defenses of waiver or estoppel. Thus, by implication, the lower Court ruled that the Petitioner was not entitled to a hearing to establish waiver or estoppel.

The Petitioner was a subcontractor which had furnished certain materials to the general contractor of a construction project for the Respondent in Reading, Pennsylvania. Subsequently, the general contractor filed for reorganization under Chapter 11 of the Bankruptcy Code without having paid the Petitioner for the materials delivered to the project. For this reason the Petitioner filed a mechanics lien against property of the Respondent.

Because Petitioner was a subcontractor, the Pennsylvania Mechanics Lien Law required it to serve the Respondent with a thirty-day notice of its intention to file a mechanics lien (49 P.S. §1501(b)), which it did. Thirty-seven days thereafter, on April 1, 1985,

the Petitioner filed its mechanics lien in the amount of $45,395.00. The Pennsylvania Mechanics Lien Law required the Petitioner, within one month thereafter, to serve the Respondent with a notice that the mechanics lien had been filed, giving the term and number and date of filing of the claim (49 P.S. §1502(a)(2)). The Statute further provides that twenty days after service of that notice, an Affidavit of Service must be filed setting forth the date and manner of service (id). The Statute further provides:

> "Failure to serve such notice or to file the affidavit...of service within the time specified shall be sufficient ground for striking off the claim." (id)

The Petitioner failed to file an Affidavit of Service as required, and consequently the record, which consisted

only of the pleadings and the mechanics lien itself, is devoid of evidence as to whether or not the notice was in fact served.

RAISING OF THE FEDERAL QUESTION

The Petitioner did not directly cite the 14th Amendment in the State Court proceedings, but it did argue that the lower Court's decision deprived it of its mechanics lien without a hearing, clearly a reference to a lack of due process. Thus in its Application for Reargument to the Superior Court the Petitioner stated:

> "The effect of the decision is to dismiss the Plaintiff out of Court on a technicality without a hearing, and it leaves the Plaintiff without a remedy even though it admittedly furnished the materials for which the mechanics lien was filed and the Defendant had the benefit of those materials." (Appendix C, infra, p. 44)

The Petitioner made the identical statement in its Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. (Appendix C, infra, pp. 42-43)

The federal question has thus been raised pursuant to the ruling in Taylor v. Kentucky, 436 U.S. 478, in which this Court held it had jurisdiction to review a State Court decision where the counsel for the Petitioner, while not referring to the due process clause specifically, had objected to the denial of a requested instruction by invoking "fundamental principles of judicial fair play." The Court stated "This should have sufficed to alert the trial judge to Petitioner's reliance on due process principles." 436 U.S. at 482, n. 10.

REASONS FOR GRANTING THE WRIT

By striking the Petitioner's mechanics lien on a technicality without a hearing, the lower Court deprived the Petitioner of a property right in violation of the due process clause of the 14th Amendment. As held in the case of Security-First National Bank of Los Angeles v. Rindge Land & Navigation Co., 85 F.2d 557 (C.C.A. Cal. 1936), rehearing denied 86 F.2d 3, cert. denied 299 U.S. 613, rehearing denied 300 U.S. 686, the right of a creditor to retain a lien until the obligation is paid is a substantive property right, and depriving a creditor of such right is violative of the 14th Amendment. Further, a State may not, through its judicial branch, disregard the

constitutional prohibition. Buchalter v. New York, 319 U.S. 427.

The Petitioner had, in the Pennsylvania Courts, based its claim for a right to amend its pleadings and present evidence on the issues of waiver and estoppel on prior Pennsylvania cases which had held that the failure to file an Affidavit of Service is not fatal, Lilly v. Jaggard, 48 Pa. Super. 439 (1912) (if such failure was at the request of the owner or due to his fraudulent or tortious act), and recognized waiver and laches as justifiable reasons for failure to file the Affidavit. Samango v. Hobbs, 167 Pa. Super. 399, 75 A. 2d 17 (1950). In the latter case, the Superior Court stated:

> "...since the requirement to file the affidavit is, in our opinion, mandatory and the learned court below found that there was no waiver of the requirement and that Defendants

> were not guilty of laches, the Motion to Strike Off the Judgment was properly granted." 167 Pa. Super. at 404."

The lower Court in the instant case held, however, that the statutory provisions must be strictly complied with and there is no room for the defenses of laches, waiver and estoppel. (Appendix B, infra, pp. 40-41) The Superior Court agreed, stating:

> "Since Appellant's admitted failure to comply with the statute has created this uncertainty [as to whether the Appellee had proper notice], it is not entitled to such defenses." (Appendix B, infra, p. 30)

But that is circular reasoning. It is no answer to the Petitioner's contention, supported by cases, that laches, waiver and estoppel are defenses to the failure to file an Affidavit of Service, that the Petitioner is not

entitled to those defenses because it failed to file an Affidavit of Service.

Moreover, the record is clear that the Respondent did receive notice of the Petitioner's intent to file the mechanics lien. That notice contained essentially the same information that the mechanics lien itself would contain (compare 49 P.S. §1501(c) and 49 P.S. §1503, Appendix A, infra, pp. 20-22, 24-25), and its purpose was to alert the Respondent to set aside monies to satisfy the lien and withhold payment to that extent on its contract with the general contractor. Thirsk v. Evans, 211 Pa. 239, 60 A. 726 (1905).

Since the Petitioner was a subcontractor, it had no privity of contract with the Respondent owner and has

no other remedy except its worthless claim against the bankrupt general contractor.

A fundamental requirement of due process is the opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545. Accordingly, due process of law has been said to mean "a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial." Ex parte Wall, 107 U.S. 265.

Before a person is deprived of an interest encompassed by the 14th Amendment's protection of liberty and property, he must be afforded an opportunity for some kind of hearing, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. Smith v.

Organization of Foster Families, 431 U.S. 816.

The due process right to be heard prior to deprivation of property does not depend upon an advance showing that one will surely prevail at the hearing; the simplicity of the issues involved in determining the ultimate right to continued possession of the property may be relevant to the formality and scheduling of the prior hearing, but it cannot undercut the right to a hearing of some kind. Fuentes v. Schevin, 407 U.S. 67.

The right under the due process clause to a full hearing includes the right of the party whose rights are sought to be affected to introduce evidence and have judicial findings based upon it.

Baltimore & Ohio RR Co. v. U.S., 298 U.S. 349.

The Petitioner, having been deprived of its property right protected by the 14th Amendment by the State Courts of Pennsylvania without an opportunity for a hearing, as guaranteed by the 14th Amendment, wherein it could produce evidence to justify its failure to comply with a technical requirement of the Pennsylvania Mechanics Lien Law, this arbitrary conduct of the Pennsylvania State Courts should not go uncorrected by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

W. William Anderson
SMITH & LeCATES
Attorneys for Petitioner

June, 1989.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PENNSYLVANIA MECHANICS' LIEN LAW OF 1963

49 P.S. §1501

Notices by subcontractor as condition precedent.

* * * * * * * * * *

(b) Formal Notice in all Cases by Subcontractor. No claim by a subcontractor, whether for erection or construction or for alterations or repairs, shall be valid unless, at least thirty (30) days before the same is filed, he shall have given to the owner a formal written notice of his intention to file a claim, except that such notice shall not be required where the claim is filed pursuant to a rule to do so as provided by Section 506.

(c) Contents of Formal Notice. The formal notice shall state:

(1) the name of the party claimant;

(2) the name of the person with whom he contracted;

(3) the amount claimed to be due;

(4) the general nature and character of the labor or materials furnished;

(5) the date of completion of the work for which his claim is made;

(6) a brief description sufficient to identify the property claimed to be subject to the lien; and

(7) the date on which preliminary notice of intention to file a claim was given where such notice is required by subsection (a) of this section, and a copy thereof.

The notice may consist of a copy of the claim intended to be filed,

together with a statement that the claimant intends to file the original or a counterpart thereof.

(d) Service of Notice. The notices provided by this section may be served by first class, registered or certified mail on the owner or his agent or by an adult in the same manner as a writ of summons in assumpsit, or if service cannot be so made then by posting upon a conspicuous public part of the improvement.

49 P.S. §1502

(a) Perfection of Lien. To perfect a lien, every claimant must:

(1) file a claim with the prothonotary as provided by this act within four (4) months after the completion of his work; and

(2) serve written notice of such filing upon the owner within one (1) month after filing, giving the court term and number and date of filing of the claim. An affidavit of service of notice, or the acceptance of service, shall be filed within twenty (20) days after service setting forth the date and manner of service. Failure to serve such notice or to file the affidavit or acceptance of service within the times specified shall be sufficient ground for striking off the claim.

* * * * * * * * * *

(c) Manner of Service. Service of the notice of filing of claim shall be made by an adult in the same manner as a writ of summons in assumpsit, or if service cannot be so made then by posting upon a

conspicuous public part of the improvement.

49 P.S. §1503 Contents of claim.

The claim shall state:

(1) the name of the party claimant, and whether he files as contractor or subcontractor;

(2) the name and address of the owner or reputed owner;

(3) the date of completion of the claimant's work;

(4) if filed by a subcontractor, the name of the person with whom he contracted, and the dates on which preliminary notice, if required, and of formal notice of intention to file a claim was given;

(5) if filed by a contractor under a contract or contracts for an agreed sum,

an identification of the contract and a general statement of the kind and character of the labor or materials furnished;

(6) in all other cases than that set forth in clause (5) of this section, a detailed statement of the kind and character of the labor or materials furnished, or both, and the prices charged for each thereof;

(7) the amount or sum claimed to be due; and

(8) such description of the improvement and of the property claimed to be subject to the lien as may be reasonably necessary to identify them.

APPENDIX B

THE DECISIONS BELOW

Order of the Supreme Court of Pennsylvania endorsed on Petitioner's Petition for Allowance of Appeal:

"March 31, 1989. Petition Denied. Per Curiam."

Order of the Superior Court of Pennsylvania dated October 7, 1989:

"The Court hereby DENIES the appellant's application for reargument of the decision dated August 15, 1988."

Opinion of the Superior Court of Pennsylvania filed August 15, 1988:

"MEMORANDUM:

Appellant, Manville Sales Corporation, appeals from an order of the trial court

sustaining Appellee's preliminary objections to, and striking, Appellant's mechanics' lien. The trial court held that Appellant's failure to file an affidavit of service of notice of filing its claim, required by §502(a)(2) of the Mechanics' Lien Law of 1963, invalidated the lien. We affirm.

Appellant is the successor to Johns-Manville Sales Corporation (Johns-Manville). In 1984, Johns-Manville supplied certain materials to Wertz Engineering Co. (Wertz), which was the general contractor on a new construction project for Appellee, A.T. & T. Technologies, in Reading, Pennsylvania. In 1985, Wertz filed for reorganization under Chapter 11 of the Bankruptcy Code without having paid Appellant for the materials previously delivered to

Appellee's work site. Appellant sent Appellee a thirty (30) days notice of its intention to file a mechanics' lien against Appellee's property on February 21, 1985. The mechanics' lien was field by Appellant on April 1, 1985, in the amount of forty-five thousand, three hundred ninety-five ($45,395.00) dollars.

On January 26, 1987, Appellant filed a complaint to enforce the lien filed almost twenty-two (22) months earlier. On February 23, 1987, Appellee filed preliminary objections in the nature of a motion to strike the mechanics' lien, alleging, inter alia, that Appellant failed to file an affidavit of service of notice of filing the mechanics' lien claim as required by §502(a)(2) of the

Mechanics' Lien Law of 1963.[1] Appellant defended on the ground that Appellee was either guilty of laches or waived its right to raise the defect due to its delay in seeking to strike the lien. The Court of Common Pleas found that Appellee was not guilty of laches, nor had it waived its right to raise Appellant's defect in perfecting its claim, and struck the lien. It is from the order of the trial court striking its lien that Appellant appeals.

On appeal, Appellant first complains that Appellee, by its delay of over twenty-three (23) months before moving to strike the lien, was guilty of laches, and as a result, either waived its right to, or should have been estopped from,

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[1]Act of August 24, 1963, P.L. 1175, No. 497, 49 P.S. §1101, et seq.

raising appellant's defect. Upon review of the record and the trial court's opinion, we find that the trial court adequately discussed and correctly decided the issue of laches, waiver, and estoppel. See also Rees, Weaver and Co. v. M.B.C. Paper Mill, 267 Pa. Super. 148, 406 A.2d 562 (1979). As the trial court pointed out: "It may be possible that the [Appellee] took no action to strike the lien for a twenty-five (25) month period because the [Appellee] did not have proper notice." Slip Op. p. 3. Since Appellants admitted failure to comply with the statute has created this uncertainty, it is not entitled to such defenses.

Appellant also contends that the trial court erred in its interpretation of the statute and argues that a subcontractor should not be held to the same strict

compliance with the statute as a general contractor. We find this claim also to be without merit. Section 502(a) of the Mechanics' Lien Law of 1963, Act of August 24, 1963, P.L. 1175, No. 497, Art. V, Section 502(a), 49 P.S. §1502(a) specifically provides:

> (a) Perfection of Lien. To perfect a lien, every claimant must:
>
> (1) file a claim with the prothonotary as provided by this act within four (4) months after the completion of his work; and
>
> (2) serve written notice of such filing upon the owner within one (1) month after filing, giving the court term and number and date of filing of the claim. An affidavit of service of notice, or the acceptance of service, shall be filed within twenty (20) days after service. Failure to serve such notice or to file the affidavit or acceptance of service within the times specified shall be sufficient ground for striking off the claim. (emphasis supplied).

In addition to the above general requirements imposed on "every claimant"

to perfect a lien, §501(b) of the Act[2] places an additional requirement upon subcontractors involved in new construction projects to serve a formal thirty (30) day notice on the owner of their intention to file a lien as a pre-condition to filing and perfecting a valid lien.

Appellant does not cite to, nor has our research disclosed, any authority for its argument that subcontractors are to receive some special consideration when they have failed to follow the mandatory procedures of the Act. We are mindful, moreover, of our Supreme Court's statement in O'Kane v. Murray, 252 Pa. 60, 97 A. 94 (1916), where the claimant failed to

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[2]49 P.S. §1501(b).

properly serve the notice of the filing of the claim:

> The right to file a mechanics' lien, as has been uniformly held by all the courts, is of statutory origin. No such right existed at common law. It is class legislation and therefore must be strictly construed. If a party desires to avail himself of it, he must comply strictly with the provisions of the statute conferring the right.

Id. at 68, 97 A. at 96.

We have previously held that where a sub-contractor's formal notice of intention to file a lien was served only twenty-one (21) days before the filing of the lien and not the full thirty (30) days required by the statute, the lien was defective on its face and, barring amendment, was subject to being struck. Zeigler Lumber and Supply Company v. Golden Triangle Development Company, Inc., 229 Pa. Super. 548, 326 A.2d 524 (1974).

This Court has never hesitated to give the Mechanics' Lien Law its full effect with regard to subcontractors, and will not do so in this instance.

Appellant's reliance on Lilly v. Jaggard, 48 Pa. Super 439 (1912), and Samango v. Hobbs, 167 Pa. Super. 399, 75 A.2d 17 (1950), is misplaced. In Lilly, we said that the statutory duty on the claimant to file an affidavit of service of notice within the prescribed period might be excused if the delay was at the request of the owner or was due to his fraudulent or tortious act. No such claim is made in the case before us. In Samango, we upheld the trial court's ruling that the owners had not waived their right to raise the claimants' failure to file the affidavit of service, not only after the lien was filed, but

following execution on the judgment and sheriff's sale. Accordingly, we find appellant's argument without support.

Order affirmed.

Opinion of the Court of Common Pleas of Berks County, Pennsylvania dated November 9, 1987:

"This opinion is in support of our order granting the defendant's preliminary objections to strike a mechanics' lien for failure of the plaintiff to comply with 49 P.S. §1502(a)(2), which requires a filing of an affidavit of service of notice within twenty (20) days after service.

The facts of this case are as follows. The plaintiff, Johns-Manville Corporation, in 1984 supplied construction materials to a contractor who was working on a

construction project for the defendant, A.T. & T. Technologies, Inc. In 1985 the contractor for the defendant's construction project filed for reorganization under Chapter 11 of the Bankruptcy Code without having paid the plaintiff for the materials delivered to the project.

On February 21, 1985, the plaintiff sent a thirty (30) day notice of his intention to file a mechanics' lien against the defendant's property. On April 1, 1985, the plaintiff filed the mechanics' lien in the amount of Forty-Five Thousand, Three Hundred Ninety-Five ($45,395.00) Dollars. The plaintiff, however, failed to file an affidavit of service of notice within twenty (20) days as required by the statute. On January 26, 1987, the plaintiff filed a complaint

in this court to enforce the mechanics' lien. The defendant then filed preliminary objections to strike the lien.

It is settled law in Pennsylvania that the filing of an affidavit of service is mandatory and failure to comply with the statute will invalidate the lien. McCarthy v. Reed Terrance, Inc., 420 Pa. 534, 218 A.2d 229 (1966); Day and Zimmerman v. Blocked Iron Corp., 394 Pa. 386, 147 A.2d 332 (1959). The reason that a court must strictly construe the mechanics' lien statute is that a mechanics' lien is a purely statutory right and there is no such remedy available at common law, thus a person seeking the benefit of the Act must proceed in strict compliance. Samango v. Hobbs, 167 Pa. Super. 399, 75 A.2d 17 (1980).

The plaintiff has raised several argument that he believes prevents the mechanics' lien from being stricken. The plaintiff first argues that the defendant is guilty of laches for waiting twenty-five (25) months to object to the filing of the mechanics' lien. This court believes that the twenty-five (25) month delay did not constitute laches. The Pennsylvania Supreme Court in O'Kane v. Murray, 252 Pa. 60, 97 A.94 (1916), discussed the importance of the affidavit of service in the mechanics' lien statute. The Court stated that:

> "The purpose of the provision is apparent. It is to protect the owner by furnishing him an opportunity while the facts are accessible to ascertain if the claim is correct, if the labor and materials were furnished as set forth in the lien, and if the claim has been properly and legally entered so as to bind his real estate. In a large building operation there may be many parties entitled to file claims, and it is important to the owner that the

several claimants give him the notice required by the statute."
Id. at 97."

We believe that the reasoning stated almost seventy (70) years ago by the Pennsylvania Supreme Court is still applicable today. The affidavit of service was enacted by the legislature as a form of insurance for a large corporation such as A.T. & T. Technologies so that they would have notice of the filing of a mechanics' lien. Without the affidavit of service there can be no guarantee that the defendant was properly served. It may be possible that the defendant took no action to strike the lien for a twenty-five (25) month period because the defendant did not have proper notice.

Plaintiff also argues that due to the twenty-five (25) month delay in attempting

to strike the lien the defendant should be estopped from striking the lien. The essential elements of estoppel are misleading words, conduct or silence by the party against whom estoppel is asserted, unambiguous proof of reasonable reliance on the misrepresentation by the party seeking to assert the estoppel, and no duty of inquiry on the party seeking to assert estoppel. Straup v. Times Herald, 283 Pa. Super. 58, 423 A.2d 713 (1981). We believe that there can be no reasonable reliance on the part of the plaintiff when he has failed to comply with a statutory provision. We thus deny him relief based on the grounds of estoppel. This court also believes that the requirement that the mechanics' lien provisions be strictly complied with prevents us as a matter of law from

allowing the plaintiff to raise the defense of waiver.

Under the facts of this case, we have no alternative but to grant the defendant's preliminary objections to strike the lien.

BY THE COURT:

THOMAS J. ESHELMAN, J.

Order of the Court of Common Pleas of Berks County, Pennsylvania dated April 27, 1987.

"AND NOW, this 27 day of April, 1987, defendant's preliminary objections are sustained. The Mechanics' Lien Claim filed in this action on April 1, 1985 is hereby stricken.

BY THE COURT,

THOMAS J. ESHELMAN, J.

APPENDIX C

EXCERPTS FROM THE RECORD

Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, pages 3-4:

"REASONS FOR ALLOWANCE.

The Superior Court's decision is contrary to this Court's holding in Otto v. American Mutual Insurance Co., 428 Pa. 202, 393 A.2d 450 (1978), by upholding the lower Court's dismissal of the Plaintiff's Complaint without leave to amend in order to permit the Plaintiff to plead and prove laches, waiver or estoppel.

The effect of the lower Court's decision was to dismiss the Plaintiff out of Court on a technicality without a hearing, and it leaves the Plaintiff without a remedy even though it admittedly

furnished the materials for which the mechanic's lien was filed, and the Defendant had the benefit of the materials. In addition, the Defendant had actual notice of the Plaintiff's intent to file a mechanic's lien, the purpose of which was to alert the Defendant to set aside monies to pay for the materials and withhold the monies from the general contractor which was in bankruptcy. See Thirsk v. Evans, 211 Pa. 239, 245, 60 A.726 (1905).

"APPLICATION FOR REARGUMENT:

(To the Superior Court of Pennsylvania), page 1:

In a Memorandum Opinion and Judgment filed August 15, 1988, the three-judge panel of the Superior Court (Rowley, Wieand, and Montemuro, JJ.) affirmed the

Order of the Berks County Court of Common Pleas which had ordered the Plaintiff's mechanic's lien stricken for failure to file an affidavit of service.

In so doing, the Court has misapprehended the significance of the fact of record that the Plaintiff was a subcontractor, which fact is material to the outcome of the case.

The effect of the decision is to dismiss the Plaintiff out of Court on a technicality without a hearing, and it leaves the Plaintiff without a remedy even though it admittedly furnished the materials for which the mechanic's lien was filed, and the Defendant had the benefit of the materials. In addition, the Defendant had actual notice of the Plaintiff's intent to file a mechanic's lien, the purpose of which was to alert

the Defendant to set aside monies to pay for the materials and withhold the monies from the general contractor which was in bankruptcy.